TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Canadian National Railway v. Canada (Minister of Transport)*, 2021 TATCE 39 (Appeal)

TATC File No.: Q-0025-41

Sector: Rail

BETWEEN:

Canadian National Railway, Appellant

- and -

Canada (Minister of Transport), Respondent

[Official English translation]

Heard by:	Written submissions
Before:	George 'Ron' Ashley, Member (chairing) John Gradek, Member Michael Regimbal, Member
Rendered:	November 29, 2021

APPEAL DECISION AND REASONS

Held: The appeal is dismissed. The review member was reasonable in rejecting CN's due diligence defence and correctly applied the strict liability standard. The monetary penalty of $71,499.12 is upheld.

The total amount of $71,499.12 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this decision.

I. BACKGROUND

[1] This is an appeal of a Transportation Appeal Tribunal of Canada (TATC) review determination, issued on March 29, 2019, regarding a Notice of Violation (Notice) that Transport Canada (TC) issued to Canadian National Railway (CN) on August 16, 2017. The Notice included an administrative monetary penalty (AMP) of $71,499.12. This AMP amount was confirmed following the review.

[2] The alleged violation is as follows:

> On or about April 20, 2017, in Garneau Yard, located in Shawinigan, Québec, the Canadian National Railway allowed railway freight cars to be continued in service with safety defects described in Part II of the *Freight Car Inspection and Safety Rules* thereby violating Rule 4.1 of the *Freight Car Inspection and Safety Rules.*

[3] The appeal was conducted by way of written submissions that were filed by both parties. CN did not file a reply to the response of the Minister of Transport (Minister).

A. Review determination

[4] The member noted that the facts giving rise to the Notice were not in dispute and concluded that on April 20, 2017, in CN's Garneau Yard in Shawinigan, Quebec, CN authorized the continued use of freight cars with the defects identified by the Minister in the Notice. Following this finding, the review member's determination focussed on CN's due diligence defence.

[5] With respect to the due diligence defence, the member concluded:

> [32] The Tribunal finds that the evidence of due diligence to prevent the alleged violation was not sufficiently detailed or specific. CN's witness explained that CN had the elements of a system to train employees to perform inspections and even to implement the requirements of the AAR. However, the Tribunal finds that there was not enough detailed, clear and specific evidence on the effectiveness of this system, especially given the type and seriousness of the defects found. There was insufficient evidence of the programs, monitoring or measures at Garneau Yard; every measure taken should have had an impact on the safety culture, from the senior executives to the employees inspecting the cars. In addition, the evidence suggested that there were so-called problematic inspections and employees. CN affirmed in testimony that one to two minutes per inspection did not endanger rail safety; however, the Minister demonstrated through evidence the many defects contrary to the rules developed by the railway industry and approved by the Minister. Under these circumstances, the Tribunal finds that the due diligence defence cannot be retained.

[6] CN raises primarily this paragraph in this appeal, arguing that it demonstrates that the review member failed to properly consider relevant evidence and applied an incorrect due diligence test.

B. Legal framework

[7] Section 4.1 of the Railway Freight Car Inspection and Safety Rules provides:

> **4.1** Subject to sections 20 and 21, of these Rules, a railway company shall ensure the freight cars it places or continues in service are free from all safety defects described in Part II of these Rules, and that such cars comply with General Order No. 0-10, "*Regulations Respecting Railway Safety Appliance Standards*", or the latest edition of AAR Safety Standard S-2044 "Safety Appliance Requirements for Freight Cars" of the Manual of Standards and Recommended Practices.

[8] Under subsection 40.19(3) of the *Railway Safety Act*, the appeal panel may dismiss or allow the appeal and, in allowing it, the panel may substitute its decision for the determination.

C. Grounds for appeal

[9] The appellant states two grounds of appeal:

i. that the determination was based on an erroneous assessment of the facts and evidence; and

ii. that the review member applied a higher burden of proof and of due diligence than that required for the due diligence defence.

II. ANALYSIS

A. Standard of review

[10] According to the appellant, the reasonableness standard applies to the first ground. It is based on the apprehension that the review member summarily rejects CN's due diligence defence in that the rationale for rejecting that defence is set out in only two paragraphs of the determination. That rationale ignores the extent of evidence filed by CN on the breadth of its safety systems in place. According to the appellant, this represents an error of fact or mixed fact and law arising out of the review member's failure to consider relevant evidence.

[11] As for the second ground of appeal, the appellant points out that it is a question of law that must be assessed on a standard of correctness. The appellant submits that the review determination in this case is too restrictive in the sense that it only examines the record of defects found and the work history of CN employees relating to those inspection defects, failing, as such, to consider the due diligence steps CN had actually taken to manage the defects and employees. This, according to the appellant, shows that the review member adopted an absolute liability standard to assess the alleged violation and not a strict liability one.

[12] The Minister agrees with CN's submissions as to the applicable standards for the two grounds of appeal.

[13] This panel agrees with these standards for the purposes of this appeal. This is consistent with the reasons set out in *Canada (Attorney General) v. Friesen*, 2017 FC 567, where the Federal Court ruled that, on questions of fact and mixed fact and law, a TATC appeal panel is to adopt the reasonableness standard of review. Where an appeal ground alleges an error of law, this is to be reviewed on a standard of correctness. This is also consistent with a recent appeal decision of this tribunal in *Jules Selwan v. Canada (Minister of Transport)*, 2020 TATCE 1 (Appeal).

[14] Thus, for errors of fact and errors of mixed fact and law (ground of appeal 1), the standard of reasonableness requires the appeal panel to determine whether the review member's determination and its rationale have the attributes of reasonableness.

[15] For errors of law where the member is alleged to have erred with respect to the legal test used in the review (ground of appeal 2), the standard of correctness applies. If the appeal panel determines that the member applied the wrong legal test, then it must conduct its own analysis of the issue and decide whether it agrees with the review member's determination. If not, the appeal panel will substitute its own interpretation of the law and make the appropriate decision.

B. Facts

[16] The facts are summarized in the appellant's factum, are agreed upon by the Minister, and are accepted by this panel as accurate:

> In April 2016, inspections of CN-operated train cars are performed by Transport Canada. On April 15, 2016, Inspector Kevin Ouimet issues an order for CN to inspect cars departing from Senneterre, Quebec, to its Garneau Yard in Shawinigan, Quebec.
>
> In response to the Transport Canada order, CN implements a system of corrective measures. As a result of these changes, Inspector Ouimet withdraws his order on or about June 13, 2016.
>
> Another inspection is conducted by Transport Canada in August 2016, following which a warning letter is issued to CN. In response to this warning letter, CN implements further corrective measures.
>
> On April 20, 2017, Mr. Ouimet and another Transport Canada inspector, Mr. Reno Gallant, inspect gondola cars used by CN to transport wood chips. A total of 39 cars are inspected for more than two and a half hours. The inspection takes place in the early afternoon and safety defects were found by the inspectors.

C. First ground of appeal: Was the determination based on an erroneous assessment of the facts and evidence?

[17] In its factum, the appellant writes:

> We submit that the Review Tribunal's summary assessment focussed only on the training offered by the Appellant, whereas the Appellant presented detailed evidence on its entire system. This is therefore an error in the assessment of the evidence that must be corrected.

[18] In particular, the appellant's arguments here are based on two points:

i. CN took **reasonable precautions** to ensure the safety of its operations and their compliance with the applicable regulatory framework; and

ii. **the proper functioning** of its preventive measures.

(1) Reasonable precautions

[19] CN argues that well before April 2017, it had responded to car safety concerns with a series of preventive measures that exceeded regulatory requirements. These, according to CN, were designed to promote the safety of its operations at the Shawinigan Yard and included specific steps to address the detection of defective cars in the yard.

[20] The appellant argues the review member undervalued the CN evidence on these points or missed other points.

[21] In terms of the evidence on CN's safety precautions, CN relied on the one witness, Mr. Pascal Ratté. He was presented as an experienced railway supervisor and testified on CN's car inspection and safety programs. Overall, the review member found that his testimony demonstrated that CN advocates for a safe operating environment and, to this end, has many system-wide safety programs in place. The member noted this as being particularly true for CN's training and mentoring of carmen and carwomen but went on to conclude that this does not "excuse" or, in other words, exempt it from complying with the governing Canadian safety laws and regulations (determination at paragraph 31).

[22] The panel finds it is misleading to categorize due diligence as being an exemption to an alleged infraction. Notwithstanding this inference, the member's actual due diligence assessment, which appears in paragraph 32 of the determination, demonstrates that the CN evidence on due diligence was assessed by the review member as a defence and not as an exemption.

[23] The review member summarized the evidence submitted by CN and ultimately concluded that it was not sufficiently detailed and specific for him to find in CN's favour on due diligence. This is a reasonable finding for the reasons that follow.

[24] The review member noted the testimony of Mr. Ratté to the effect that each carman and carwoman was trained by way of a combination of class instruction, apprenticeship and testing for employee certification. But, beyond this narrative, there was little more in terms of evidence. For example, there were no available testing records showing course content, participation or employee results. This is consistent with the review member's conclusion that there was insufficient detail about the training CN provided to its employees.

[25] The member also noted the testimony indicating that inspection employees at the yard were given courses and mentoring and participated in discussions, all to ensure an awareness of applicable operating rules including those relating to car inspections. No evidence was available to document this or to otherwise clarify its scope. This also points to a lack of detail consistent with the review member's conclusion on there being little evidentiary support.

[26] CN argues that an important part of Mr. Ratté's testimony related to supervisory audits that were established in 2016-2017 to ensure that employee car inspections were satisfactory. Evidence in support of these "quality audit inspections" undertaken at the Garneau Yard was lacking. This corresponds to the review member's finding that there was a lack of specificity in the CN defence.

[27] In this appeal, CN also argues that the disciplinary system that existed for car inspectors at the yard was graduated and effective, all to ensure ongoing rule compliance. Given the history of reported car defects that were identified at the Garneau Yard, disciplinary records would be expected to exist but none were produced. This absence is consistent with the member's finding that there was insufficient detail in CN's due diligence evidence.

[28] The review determination offers a summary of the CN evidence on safety measures undertaken to address car defects. As a summary, not every detailed aspect of the evidence was set out in the determination. At the end of that summary, the member considers the evidence in totality and then concludes that CN did not present sufficient specific detailed proof to support a successful due diligence defence in this case. As set out above, this is a reasonable finding.

(2) The proper functioning of its preventive measures

[29] CN argues that the review member did not consider or properly consider the evidence on the effective implementation of the cited CN prevention measures. CN argues that the determination instead, and improperly, centred on the historical inspection problems found by Transport Canada inspectors – ones that pre-date April 2017. This, according to CN, is not conclusive of an ineffective CN safety program for car inspections.

[30] CN argues that the best evidence on the effective implementation of safety measures taken following the 2016 inspections was that of Mr. Ratté. He testified that senior CN officials took the 2016 events "very, very seriously", enhancing, as a direct result, a program of weekly (vs. monthly) mandatory "quality audit inspections" by supervisors. There had also been an internal audit at the Garneau Yard where several senior CN officials visited to examine yard planning and car inspections. This included the attendance by two instructors who addressed all yard employees on proper car inspection techniques. CN also noted the repair of up to 350 hopper cars that had been identified as defective. An invoice detailing the repairs undertaken was filed as evidence before the review member.

[31] The Minister counters, arguing that the review member committed no reviewable error, and that the determination must be viewed in light of the entire file. Even if certain CN evidence was not referenced in the member's determination, the Minister submits that there is a presumption that it was considered and weighed, citing in support *Boulos v. Canada (Public Service Alliance)*, 2012 FCA 193 (para. 11).

[32] The review member concluded there was insufficient evidence tendered relative to the effectiveness of the listed remedial efforts. This is a reasonable finding.

[33] For example, the specific results of the internal audit of the yard, ideally filed as a business record, would have shed light on CN's inspections and the remedial efforts undertaken to deal with the recurring car inspection problems; the same for the results of the quality audits undertaken by supervisors, as well as employee training records. The evidence at the review hearing on these items was essentially limited to the oral testimony of Mr. Ratté. It was reasonable for the review member to conclude that more was needed in terms of detail and confirmation in order to sustain a due diligence defence.

D. Second ground of appeal: Did the review member apply a higher burden of proof and of due diligence than that required for the due diligence defence?

[34] CN argues that the review member erroneously relied on the record of car defects found to exist, leading up to and including those found on April 20, 2017, and concluded, once found, that this showed that CN was not duly diligent. On this point, CN submits that the defects that were found are only relevant to the first part of the analysis, that is, the proof of the *actus reus* of

the infraction. They are not to be used in the second part, or the "due diligence" assessment, and this failure represents an error of law.

[35] In particular, according to CN, by relying on the record of car defects and ignoring the other evidence tendered by CN, the review member erroneously applied an absolute liability standard to the violation.

[36] In support of this position, CN cites a TATC appeal panel decision in *Cando Rail Services Ltd. v. Canada (Minister of Transport)*, 2019 TATCE 3 (Appeal), where it was decided that the facts giving rise to an alleged violation do not, by themselves, signify that reasonable safety measures were not in place.

[37] The panel agrees that the *actus reus* of an alleged violation here, the car defects found to exist in April 2017, does not then conclusively point to a lack of due diligence. What constitutes due diligence is a separate matter, forming part of a strict liability test.

[38] However, the panel disagrees with the CN assertion that the review member applied an absolute liability standard by (i) relying on the existence of defects to find a lack of due diligence and (ii) ignoring the other evidence filed concerning CN's remedial efforts.

[39] Ultimately, the review member found that there was insufficient detailed and specific proof of safety steps undertaken to improve car inspections at the Garneau Yard leading up to and including April 2017. The appeal panel will not interfere with this finding. The review member was mindful of the need for a strict liability assessment and did not simply rely on the record of car defects as conclusive of CN's liability.

[40] Rather, the member looked at the available evidence and noted the lack of detailed and specific evidence on the steps CN undertook to avoid the defects from taking place. The record of car defects filed as evidence before the review member lacked neither specificity nor detail. It was the other evidence tendered by CN, notably that of Mr. Ratté and referenced by the review member in paragraph 32 of the review determination, that he found lacked those overall qualities. In so finding, the review member made no error of law in his determination.

III. DECISION

[41] The appeal is dismissed. The review member was reasonable in rejecting CN's due diligence defence and correctly applied the strict liability standard. The monetary penalty of $71,499.12 is upheld.

[42] The total amount of $71,499.12 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this decision.

November 29, 2021

(Original signed)

Reasons for the appeal decision:	George ‘Ron’ Ashley, Member (chairing)
Concurred by:	John Gradek, Member
	Michael Regimbal, Member

Appearances

For the Minister:	Eric Villemure
For the Appellant:	Brian Lipson